IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., KITUSI, J.A. And MDEMU, J.A.)

CIVIL APPEAL NO. 371 OF 2022

CRDB BANK PLC ..... APPELLANT
VERSUS
SYMBION POWER TANZANIA LIMITED ..... RESPONDENT

[Appeal from the Judgment and Decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam]

(Maruma, J.)

dated the 28th day of June, 2022
in
Commercial Case No. 153 of 2021

.....

JUDGMENT OF THE COURT

25th August & 5th September, 2023

KITUSI, J.A.:

The appellant is challenging the judgment and decree of the High Court, Commercial Division in Commercial Case No. 153 of 2021. The respondent is cross-appealing.

There are two companies around which the relevant facts of this matter revolve. One is Symbion Power Tanzania Limited registered and incorporated in Tanzania. It is the one which instituted Commercial Case No. 153 of 2021, and now features as the respondent. The other one is Symbion Power LLC which we shall henceforth refer to as "the

borrower". There was no dispute that the respondent and the borrower are sister companies owned by Ms Symbion Power Holding LLC of Delaware, in the United States of America. We shall, whenever necessary, refer to it as " the Holding Company".

The dispute leading to this appeal was brought about by an overdraft facility applied by the borrower and granted by the appellant, a financial institution. It was not disputed that the borrower defaulted in liquidating the loan and as the appellant was contemplating taking recovery measures, a tripartite arrangement was made so as to assure payment of that loan and elude the recovery measures.

In that arrangement, the respondent acknowledged that the borrower was in default of payment of USD 13,000,000 to the appellant. The respondent signed a Deed of Undertaking committing itself to pay the loan. We shall refer to the details of the undertaking at an appropriate occasion. It was alleged that the respondent which was a holder of bank account No. 0250316598400 with the appellant bank, did not live up to its promise to pay.

On 11th August, 2021, Tanzania Electricity Supply Company Limited (TANESCO) deposited into the respondent's bank account

mentioned above, a total of USD 13,000,000.00. On 24th August 2021, the appellant wrote to the respondent informing it that it had utilized the said sum of USD 13,000,000.00 deposited in its account to clear the borrower's outstanding loan.

The appellant's action of transferring the money from the respondent's bank account as a way of clearing the Borrower's outstanding loan stirred the respondent into instituting Commercial Case. No. 153 of 2021 alleging that in the absence of an authority or consent from the respondent, the appellant had no mandate to utilize that money. It claimed for the following reliefs:-

> *"(i) A declaratory order compelling the defendant to refund the amount of United States of America Dollars Thirteen Million only (USD 13,000,000.00) unlawfully withdrawn by the defendant from the plaintiff's Bank Account Number 0250316598400 CRDB BANK PLC.*
>
> *(ii) Compensation of USD 4,000,000.00 due to loss of business.*
>
> *(iii) Payment of general damages as may be assessed by the court.*

(iv) To pay the plaintiff commercial interest on the aforesaid amount in (i) at the rate of 22% per month from the date when each claim accrued until the date of final payment.

(v) To pay the plaintiff court interest on the aforesaid amount in (i) at the rate of 7% per month from the date when each claim accrued until the date of final payment.

(vi) Costs of the suit be provided for.

(vii) Any other relief this Honourable Court deems just to grant."

On the other hand, the appellant maintained that it utilized the money deposited in the respondent's bank account because it was entitled to do so as per the Deed of Undertaking which had not been fulfilled.

The trial court formulated the following issues for determination:

"(1) Whether the defendant breached banker-customer relationship by unlawfully withdrawing USD 13 Million from the plaintiff's bank account.

(2) Whether the plaintiff suffered loss of business to the extent of USD 4 million.

(3) Whether the plaintiff is entitled to payment of interest.

(4) What reliefs are the parties entitled to."

We wish to remark right at the beginning that when we read the witness statements, we were left wondering whether the details in them are well captured by the issues. We shall discuss this aspect in due course. In the meantime, the following story is what was narrated by the parties in their testimonies.

The plaintiff's (respondent's) star witness was one Dr. Magesvaran Subramaniam (PW1) the CEO of the respondent who was holding special power of attorney granted by the Holding Company. He testified that the respondent's undertaking was solicited by the appellant and the borrower upon the Bank of Tanzania (BoT) raising issue with the appellant for it having granted a loan of such huge sum of money without any security. Thus, a tripartite agreement between the respondent, Borrower and the appellant was concluded by which the respondent assumed limited obligations.

According to PW1, the execution of the undertaking had three agreed conditions which were: payment of an initial sum of USD 1,490,000.00 by the undertaker, followed by payment of USD

100,000.00 monthly and thirdly deduction of 40% of whatever payments that would be made by TANESCO through the respondent's account with the appellant.

PW1 maintained that if payments by TANESCO did not come along, then there would be no obligation by the respondent to repay or to have 40% of any money deducted by the appellant. He also maintained that the undertaking had a specific period running from 31st December, 2016 to 31st December, 2017. He therefore testified that the respondent's obligation towards liquidating the borrower's loan could not go beyond the expiry date of the undertaking, that is on 31st December 2017.

It was further stated that the appellant made attempts to have the overdraft facility as well as the undertaking renewed but that did not succeed. So the critical part of PW1's testimony is on paragraph 9 at page 152 of the record where he stated:-

> *"To the extent that the Deed of Undertaking was for a specific period expiring on 31 December, 2017 and to the extent the defendant sought its renewal which was denied, plaintiff's liability to the Borrower's loan became extinct with the expiry of the undertaking."*

On that basis, PW1 testified that by debiting USD 12,999,901.00 deposited into the respondent's bank account on 18th August, 2021, way beyond 31 December, 2017, the appellant acted unlawfully and in breach of the banker-customer relationship.

On the other hand, Ms. Vestina Ngulangwa (DW1) an employee of the appellant testified in opposition to the salient features of PW1's depositions. She testified that, acting under the Power of Attorney, PW1 acknowledged the borrower's indebtedness to the appellant amounting to USD 13,000,000.00. Secondly, PW1 took it upon himself to declare the respondent as assuming full responsibility in servicing that loan and fully paying it at the time when the appellant was planning recovery measures including institution of a suit. According to DW1, the respondent decided to throw in its weight lest the appellant take recovery measures that would have far reaching implications which the borrower and the respondent could not bear.

DW1 further testified that the overdraft facility was renewed so that it was extended to 31st December, 2017. She referred to the appellant's residual right to recover the debt from the respondent and the borrower in the event of default. She testified further that the

borrower was in default, which justified the appellant writing letters of demand, which however did not yield anything. On 10th December, 2018 the respondent wrote to request for a renewal of the facility but that request was not granted.

When on 13th August, 2021 the respondent's account was credited with USD 13,000,000.00 from BoT on behalf of TANESCO, the appellant seized that opportunity to utilize the money to set off the debt as agreed in clause 6 of the Deed of Undertaking. DW1's position is that the appellant was justified in doing what it did and stated that the allegation of breach of banker-customer relationship cannot hold.

According to DW1 the payment of USD 13,000,000.00 into the respondent's bank account held at the appellant bank was a result of a Deed of Settlement between the respondent, TANESCO and the Government. In that Deed, the government undertook to pay TANESCO's debt to the respondent through the appellant in order for it (appellant) to recover its debt too.

The High Court made three key findings. The first is that in recovery of the debt, the appellant ought to have instituted a suit against the borrower instead of swiping the money deposited in the

respondent's bank account. The second is that the Deed of Undertaking was for a specific time ending on 31st December, 2017. The third is that since there was no flow of payment into the respondent's bank account, it was not its fault that the appellant was unable to recover 40% as earlier envisaged and agreed. For those reasons it proceeded to determine the framed issues. It answered the first issue in the affirmative, that is, the appellant was in breach of a banker-customer relationship by its action of swiping USD 13,000,000.00 from its customer's account when the Deed of Undertaking had expired and beyond the authorized amount. It went further to find that even if the appellant was justified to utilize the money deposited in its bank account, it could only deduct 40% of that money. It therefore dismissed the respondent's claim for USD 4,000,000.00 alleged to have been the value of the business it lost. Finally, the trial court ordered the appellant to refund to the respondent the sum of USD 13,000,000.00 minus 40% of that sum, with interest at 7% from the date of accrual of the claim till final payment. It awarded the respondent costs of the suit.

This is the decision against which there is an appeal as well as a cross appeal as earlier shown. The grounds of appeal are, with respect, mouthful but in order not to risk distortion, we shall reproduce them:

"1. The learned trial judge erred in law and fact in making an order that the Appellant refunds the respondent 60% of sum of USD 12,915,920/05 debited from the respondent's account held with the appellant. In doing so the learned trial judge erred in;

(a) failing to note and hold that under the terms of the Deed of Undertaking (exhibit P1) the respondent assumed full responsibility of settling the debt of USD 13,000,000 and USD 500,000 plus interest accrued thereon owed by the said Symbion Power LLC to the appellant under the overdraft and Term Loan facilities.

(b) finding that the Deed of Undertaking was for a specific period expiring on 31st December, 2017.

(c) finding that at the time of debiting the sum of USD 12,915,920/05 from the respondent account by the appellant, the Deed of Undertaking had expired and therefore the appellant was not entitled to debit the respondent account.

(d) failing to note and hold that in the event of default to honor the terms of payment, the Deed of Undertaking entitled the appellant to call for and recover against the respondent and or the

borrower the full outstanding amount subject of the Deed of Undertaking.

(e) falling to note and hold that the respondent had defaulted to honor the terms of the Deed of Undertaking and therefore the appellant was entitled to payment of the full outstanding amount on account of the borrower from the respondent.

(f) failing to note and hold that clause 4 of the Deed of Undertaking which authorized the appellant to debit 40% of the amount received by the respondent from TANESCO became inapplicable in the event of the respondent default to honor the terms of the Deed of Undertaking.

(g) assuming that default to honor the terms of the Deed of Undertaking could only arise from the respondent's failure to receive payment from TANESCO as provided under clause 4.

(h) failing to find that the appellant was entitled by law and banking practice to set-off any amount in any of the respondent's account against the respondent's liability to the appellant in the event of default.

(i) holding that the appellant ought to have instituted a recovery suit against the respondent instead of directly debiting the account.

(j) holding that the debiting of the respondent account was done in violation of Regulation 1 (1) (2)(b) (sic) of the Bank of Tanzania (Financial Consumer Protection) Regulations, 2019 and at the same time holding that the appellant was entitled to debit 40% of the amount credited in the respondent's account.

(k) holding that the debiting of the respondent account by the appellant was unlawful for being in breach of the banker- customer relationship.

(l) failing to consider and take cognizance of the respondent's admission of indebtedness to the appellant contained in the Deed of Settlement between the Government of Tanzania, Tanzania Electric Supply Company Limited and Symbion Power Tanzania Limited which was tendered and admitted as part of exhibit D5.

2. That, the learned trial judge erred in law and fact in awarding interest rate of 7% per month from the date when the claim accrued until the date of full settlement.

3. The findings of the learned trial judge are not reflected by the evidence on record."

The cross-appeal has the following grounds:

"1. Having found on requisite standards of proof that the respondent suffered loss and damages following the wrongful and unlawful withdrawal of the respondent's monies, the trial court erred in law and in fact for not awarding general damages to the respondent.

2. After the trial court was satisfied and having found that the appellant did breach the banker-customer-relationship following the unlawful withdrawal of the respondent's monies, the trial court erred by failing to award commercial interest rate of 22% from date of the proved unlawful withdrawal to the date of payment in full as sought and pleaded by the respondent in the plaint.

3. The trial court having held that the Deed of Undertaking executed between the appellant and the respondent was not perpetual and was not in force at the time of unlawful withdrawal, it erred in its failure to hold that the respondent was entitled to the refund of the whole amount, that

is, USD 13,000,000 as pleaded and claimed in the plaint."

We have noted that seven out of the fourteen grounds of appeal, and one out of the three grounds of cross-appeal, a total of 8 grounds, address the Deed of Undertaking (Exhibit P1). However, no issue was framed regarding the Deed of Undertaking and whether it was perpetual or not, which was ironic, regard being had on the provision of Order XIV rule 1 of the Civil Procedure Code (CPC) that *"Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other".* Notwithstanding that, it is our judgment that the learned trial judge is not wholly to blame for this, if the facts related to the Deed of Undertaking were not properly covered in the pleading. In **Bahari Oilfield Services Ltd v. Peter Wilson,** Civil Appeal No. 157 of 2020 (unreported) we reproduced the following except from **Stella Temu v. Tanzania Revenue Authority** [2003] T.L.R. 178.

"Surely the learned judge could not pretend that the question of defamation was not before him just because no issue was framed on defamation ... a court must decide a matter which it has allowed to be argued before it even if the matter is not contained in the pleadings."

Since the trial court in this case allowed the parties to argue the issue as to whether the Deed of Undertaking was perpetual or for a specific period, it correctly made a decision on it although it was not one of the issues that had been framed at the beginning of the trial. In our considered view, the question whether the Deed of Undertaking was perpetual or for a specific period is so central not only because seven grounds of appeal address it but also because it holds all other issues together. It is for those reasons that we have decided to deal with that issue of the duration of the Deed ahead of all others. It is directly raised under grounds 1 (b) and (c).

Parties hold diametrically different positions on the issue. Messrs. Gaspar Nyika and Juvenalis Ngowi, learned advocates appeared for the appellant and it was Mr. Nyika who addressed the Court. For the respondent Mr. Daniel Welwel addressed us, with Messrs. Sylvanus Mayenga and Eric Kamugisha assisting.

Mr. Nyika fervently argued that the learned judge erred by relying on oral evidence to read time limit into the Deed of Undertaking. He cited section 100 of the Law of Evidence Act and caselaw to argue that oral evidence may not be used to vary the terms contained in a written contract. The cases cited are, **Reliance Marine Insurance v. Duder**

(1913) 1 KB 256, 273; **Hitchings & Coulthrust Co. V. Northern Leather Co. of America and Doushkess** (1914) 3 KB 907 and **Bank of Australasia v. Palme** (1897) AC 540. According to the learned counsel, Exhibit P1 did not provide the Deed of Undertaking's expiry date and the learned judge should have given effect to the written version.

Mr. Nyika faulted the learned judge's reasoning that led her to conclude that the Deed of Undertaking was for a specify period. It was submitted by him that the judge's reference to the appellant's proposal for a renewal apart from having been done in response to the respondent's request, it was a request for renewal of the Overdraft Facility and it did so because the borrower had defaulted. The learned counsel concluded that if the Overdraft facility would be renewed, then the Deed of Undertaking would also have to be renewed. He however said that there was no renewal of either.

The submissions by the respondent's counsel also referred to the same principle which bars amendment of written contracts by oral evidence. He cited the case of **Joseph F. Mbwiliza v. Kobwa Mohamed Lyreeselo Msukuma & 2 Others**, Civil Appeal No. 227 of 2019 (unreported). Then Mr. Welwel submitted that DW1's testimony

referring to restructuring of the loan was, as far as the respondent is concerned, only relevant during the term of the Deed of Undertaking and not after its expiry.

In the alternative it was submitted that even assuming that the undertaking went beyond 31st December, 2017, the subsequent arrangement between the appellant and the borrower which did not have the respondent's blessings had the effect of discharging it from the undertaking. For this the case of **Exim Bank (Tanzania Limited v. Dascar Limited & Another** [2016] T.L.R 251, was cited.

In further elaboration Mr. Welwel pointed out that the respondent was not a party to the loan agreement nor was the debt assigned to it. He submitted that if the parties had wished the debt to be assigned to the respondent, they would have executed appropriate documents of assignment of debt, known and commonly done in the banking industry.

Mr. Welwel wondered how would the loan agreement have an expiry date yet expect the Deed of Undertaking to be in perpetuity. Also referring to e-mail correspondences, the learned counsel wondered why renewal of the Deed of Undertaking was not asked separately from the Overdraft facility.

In a short rejoinder on this point, Mr. Nyika submitted that all overdraft facilities have specific time. So, he submitted that the idea of a renewal of the overdraft was meant to give the borrower more time to liquidate the loan. He reiterated that if the overdraft had been renewed, the Deed of Undertaking would certainly have to be renewed.

In order to resolve this sore issue, it becomes necessary to reproduce the whole of the Deed of Undertaking even at the expense of making our decision unduly long. It is like this:

DEED OF UNDERTAKING

"This Deed of Undertaking executed this 31st day of December, 2016.

BETWEEN

CRDB BANK PLC *of P.O. Box 268 Dar es Salaam hereinafter referred to as the Bank of the first part.*

AND

SYMBION POWER LLC *of P.O. Box 105571 Dar es Salaam hereinafter referred to as "the undertaker" or the Company" as the context shall demand of the second part,*

AND

SYMBION POWER LLC *of P.O. Box 105571 Dar es Salaam hereinafter referred to as "the Borrower" or the Company" as the context shall*

demand of the second part, WITNESSET as follows:

WHEREAS:

A. *The Undertaker is a sister company of M/s Symbion Power LLC, both companies being wholly owned by M/s Symbion Power Holding LLC, a company registered in Delaware in the USA with full mandate to service the credit facilities on behalf of Symbion Power LLC as authorized by Symbion Power LLC through mandate letter dated 30th December, 2016.*

B. *The said Symbion Power LLC (herein after referred to as the Borrower) is indebted to the Bank by way of an Overdraft of USD 13,000,000 (USD Thirteen Million Only) and a Short Term Loan of USD 500,000 (USD Five Hundred Thousand Only) and interest accrued thereon, which overdraft and short term loan and expired since 31st March 2016.*

C. *The Bank was contemplating of taking recovery measures against the Borrower which measures would include but not limited to instituting a commercial suit in the Commercial Division of the High Court of Tanzania.*

D. *Being mindful of the far reaching implications of the recovery measures contemplated by the Bank, the Undertaker has approached the Bank with an Undertaking upon itself to service and or settle the debt on such manner and or modalities acceptable to the Bank.*

NOW IT IS HEREBY AGREED *as foliows:-*

1. *The Undertaker will assume as it does hereby the responsibility of settling the debt of the said Symbion Power LLC to the Bank as above indicated. And to start with the Undertaker will pay to the Bank USD 1,490,000.00 on or before 31st December, 2016 out of which USD 1,090,000 (USD One Million Ninety Thousand only) has already been received by the Bank and USD 400,000.00 shall be received on or before 2nd January, 2017.*

2. *The Bank and the Borrower shall cause the Overdraft and Short-Term loan to be restructured based on the current outstanding exposure (restructured Overdraft) for it to expire on 31st December, 2017 in line with deed of variation entered between the Bank and Symbion LCC (the Borrower) effected from 31st December, 2016.*

3. *The Undertaker shall pay to the Bank or ensure that the Bank is paid USD 100,000.00 monthly for purposes of servicing interest to the restructured Overdraft.*

4. *For purposes of serving the restructured Overdraft and/or settling the debt as aforesaid the Undertaker shall as it does hereby authorize the Bank to withdrawal from its account maintained with the Bank 40% of any payment that the Undertaker shall have received from M/s TANESCO.*

5. ***PROVIDED ALWAYS AND THAT IS WHAT HAS BEEN AGREED UPON:***

(a) The Bank and the Borrower will cause the Overdraft and Short Term Loan to be restructured as an overdraft that will operate on reducing baiance so as to be cleared on or before 31st December, 2017, the expiry date.

(b) There shall be no withdrawals from the restructured Overdraft until such time as the whole Overdraft loan shall have been cleared.

(c) Symbion Power LLC through the Power of Attorney has given authority and mandate to Dr. Magesvaran Subramaniam of No. 3 Metal Box, Karume Road, Oysterbay – Dar es Salam Tanzania and the holder of Malaysian Passport No. A33431392, to execute all documents related to restructuring of the Overdraft Facility and Short-Term Loan on behalf of Symbion Power LLC.

(d) In consideration of the said Symbion Power Tanzania assuming the responsibility of fully settling the debt of the said Symbion Power LLC to the Bank in terms of the provision herein the Bank shall as it does hereby refrain from taking any recovery measure or measures against the said Symbion Power LLC in respect of loan hereof. Provided further that and as long as Symbion Power LLC and Symbion Power Tanzania shall fuiiy comply with the agreed terms and conditions stipulated in the deed of variation and this deed of undertaking.

*6. **DEFAULT CLAUSE***

Should any instalment remain unpaid 30 days beyond its due date the whole amount then outstanding shall fall due and be payable immediately; in which event the Bank shall be at liberty to take recovery measures against both the Borrower and the Undertaker.

*7. **FOR THE AVOIDANCE OF DOUBT AND THAT IS WHAT HAS BEEN AGEED UPON***

This deed is intended to and shall have a legal effect as between the parties hereto.

***IN WITNESS HEREOF THE PARTIES** have executed this presents on the day and in the manner hereinafter appearing:"*

Before addressing the Deed of Undertaking reproduced above, we wish to make a few observations on the way the issues were framed by the trial court. We go by what we stated in the case of **Registered Trustees of Vigna Education Foundation Bangalore, India & Another v. National Development Corporation & Others,** Civil Appeal No. 88 of 2020 (unreported) that: -

"...issues are extracted from the pleadings as from them areas of conflict or difference are identified and therefore, they guide the parties in leading evidence".

In this case, we are afraid, issues were couched not as neutral questions to be given answers one way or the other, but as if they were meant to confirm liability of one party. For instance, instead of the first issue reading *"Who between the parties is in breach of their contractual obligations"* it was written: whether the defendant was in breach of that relationship. In view of the Deed of Undertaking, which we shall soon evaluate, establishing that both sides had undertaken some duties, the issue framed was too suggestive of only one party being at fault.

Now back to the Deed of Undertaking. That Deed of Undertaking is clear on the following pertinent facts: The first is the relationship between the respondent and the borrower being that of sisters (Clause A of the Deed). The second is the respondent's acknowledgement of the borrower's indebtedness to the appellant (Clause B of the Deed). The third is that the respondent is the one which approached the appellant with the proposed Deed in order to ward off the intent by the appellant to launch recovery measures which it distasted (Clause C, D and 5(d)). The fourth is that the respondent undertook the responsibility to fully settle the debt (Clause 5(d)). We are inclined to reproduce Clause 5(d) of the Deed:-

> *"In consideration of the said Symbion Power Tanzania* ***assuming the responsibility of fully settling the debt of the said Symbion Power LLC to the Bank*** *in terms of the provision herein, the* ***Bank shall, as it does, hereby refrain from taking any recovery measure or measures against the said Symbion Power LLC*** *in respect of the loan hereof. Provided further that and as long as Symbion Power Tanzania shall fully comply with the agreed terms and conditions stipulated in the deed of variation and this deed of undertaking."*

Since the Deed of Undertaking was pleaded and tendered in court as an exhibit, we are going to give meaning to it, particularly the above reproduced clause. That Deed contradicts PW1's assertion that it was the appellant who asked it to enter into that tripartite arrangement so as to avoid the wrath of BoT. To the contrary, it was the respondent and the Holding company which intervened so as to avoid recovery measures that were being contemplated by the appellant.

In our view clause 5 (d) of that Deed constitutes an offer by the respondent to fully pay the debt and on the other hand, the appellant's consideration in a form of desisting from implementing the contemplated

recovery measures which the respondent was unprepared to face. If there be time limit of the Deed of Undertaking it should, in our view, be in relation to the respondent's fundamental term of fully paying the debt. There is neither express nor implied indication that the promise in Clause 5(d) would expire on a particular date. To argue that since the Overdraft facility had an expiry date then the Deed of Undertaking must also have been for a specific period, is to attempt to give legitimacy to a party who tries to benefit from his own wrong. See the case of **George Benjamin Fernandes v. Registrar of Titles & Another,** Civil Appeal No. 65 of 2018 (unreported) where the Court disallowed the appellant's claim of compensation for the alleged loss caused in a fraudulent acquisition of title which he was a part of.

In our conclusion the only time the respondent would be discharged from liability to pay, is upon full payment of the debt as promised by it. It must also be noted that as reflected in Clause B of the Deed of Undertaking, at the time of signing it on 31st December,2016, the Overdraft facility had already expired since March 2016, so the issue of time limit within which the undertaking should be reckoned does not arise. To go the respondent's way would be both unlawful and against

equity in our view. In **CRDB Bank Limited v. Issack B. Mwamasika & 2 Others,** Civil Appeal No. 139 of 2017 (unreported) we stated :-

> *"Mr I. B. Mwamasika cannot escape the legal consequences awaiting loan guarantors in case their debtors fail to pay their loans or default in their payment schedules".*

In that case, the bank refused to return to the guarantor the title documents which had been offered as security and the Court held that the bank was entitled to that action. Although what is involved in this case is money as opposed to title documents, the principle similarly applies. See also **Evarist John Kawishe v. CRDB Bank Ltd** [2019] T.L.R 289.

From the above discussion, it is our conclusion that the trial court's finding that the Deed of Undertaking was for a specific time when the debt had not been cleared was faulty as it was not supported by the Deed itself nor logic. Mr. Welwel supports the trial court's finding which was based on oral evidence supplementing the contents of a written contract, against the rules of evidence which he himself rightly argued in his address. In the case of **National Bank of Commerce Limited v. Stephen Kyando t/a Asky Intertrade,** Civil Appeal No. 162 of 2019

(unreported), the Court held that the borrower's duty to pay remains there even if the lender bank has written off the debt. When that principle is applied to the circumstances of this case, it renders the argument as to time limit hollow and unacceptable. We fully agree with Mr. Nyika in his apt reference to the case of **Private Agricultural Sector Support Trust & Another v. Kilimanjaro Cooperative Bank Ltd,** Consolidated Civil Appeals No. 171 and 172 of 2019 (unreported), that if one borrows money he must pay. In addition, even the holding by the trial court that the appellant was entitled to retain 40% of the sum of USD 13,000,000.00 is not, in our view, consistent with its earlier finding that the Deed of Undertaking had expired and that the appellant was not entitled to utilize that money. Therefore, we find merit in ground 1 (a) to (h) which raised issue with the learned judge's interpretation of the Deed of Undertaking.

The other grounds of appeal are consequential and likely to follow suit after our determination of grounds 1 (a) to (h) in favour of the appellant. Ground 1 (i) for instance, it attacks the trial court for holding that the appellant ought to have instituted a suit. With respect, the trial court ought not to have made that finding because the very reason the respondent undertook to pay the debt was to avoid the embarrassment

of a law suit and the appellant undertook not to sue. Going by the decision of the Court in **Lulu Victor Kayombo v. Oceanic Bay Limited & Another** Consolidated Civil Appeals No. 22 and 155 of 2020 (unreported), cited to us by the appellant's counsel, it was wrong for the trial court not to give effect to what the parties had freely agreed in writing.

Ground 1 (j) challenging the trial court's holding that the appellant ought to have debited only 40%, makes sense too. First, as we have demonstrated above, this holding was a contradiction on the part of the judge who had just held the Deed of Undertaking to have expired. Secondly, the requirement of deduction of 40 % was relevant when the borrower and respondent were within the period which they had undertaken to pay. We shall link our determination of this ground with the third ground of the cross appeal.

In the third ground of the cross appeal the complaint is that having found that the Deed of Undertaking was not perpetual, the trial court ought to have ordered the appellant to refund the whole amount. This point just goes a long way to show the contradiction which we have alluded to a while ago. Our determination is that, the Deed of Undertaking did not specify the time, and the duty to pay the debt in

full, not 40% thereof, remained there because the appellant as a lender was entitled to its pound of flesh, so to speak. This ground of cross appeal has no merit, and it is dismissed.

We need not discuss ground 1 of the cross appeal because it rests on the assumption that the utilization of the money was unlawful, but we have held that it was not. Ground 2 of the cross appeal also stands on a thin surface because it claims payment of commercial interest for breach of a banker - customer relationship. We have abundantly shown that the relationship between the parties was governed by their express will in the Deed of Undertaking, so this ground crumbles as well. Conversely, and for the same reason, we find merit in ground 1 (k) of appeal which faults the learned judge for holding that the appellant breached the banker - customer relationship.

The last two grounds of appeal are easy and do not call for a discussion longer than necessary. The issue of interest raised in ground 2 has been taken care of by our determination in the preceding grounds. Since we have found the orders of compensation in favour of the respondent to have been erroneous, the issue of interest will follow suit. As for ground 3, faulting the trial judge's findings for not being reflected in the evidence, our earlier observations on the framing of issues and

the likely consequences will suffice. We wish to add that the plaint did not disclose the vital facts which came to be testified on later, so it was like seek and hide.

In fine the entire appeal is allowed with cost and the cross appeal is dismissed.

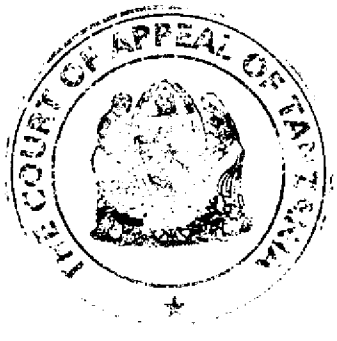
DATED at **DAR ES SALAAM** this 5th day of September, 2023.

S.E.A. MUGASHA
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 5th day of September, 2023 in the presence of Mr. Kyariga N. Kyariga, learned Counsel for the Appellant and Mr. Erick Kamugisha Rweyemamu, learned counsel for the Respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL